Supreme Court of the United States.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY AND S. H. H. CLARK *et al.*, RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY,

Plaintiffs in Error.

vs.

LISSA MARTIN, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MARTIN, DECEASED,

Defendant in Error.

No. 135.

BRIEF OF DEFENDANT IN ERROR.

ARGUMENT.

There are but two questions in this case—questions of jurisdiction. Upon the record was there a Federal question involved, and if so, could the receivers of the U. P. Ry. Co. remove the case without being joined in the application by the other defendant?

WAS THERE A FEDERAL QUESTION?

Did this suit arise under the Constitution or any law of the United States? In order to arrive at a satisfactory or intelligent conclusion it will be necessary to compare the present statute with those formerly in existence. Up to the passage of the act of 1875, the whole tendency of legislation was to increase and widen the jurisdiction of the Federal Courts. Since that time the efforts of legislation has been to curtail and narrow the jurisdiction of such Courts, and especially to diminish the grounds for removal of cases from the State Courts.

Section 2, of the law of 1875, among other things provided: "That any suit of a civil nature at law or in equity now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of Five Hundred Dollars, and arising under the Constitution and laws of the United States, *either party* may remove said suit into the Circuit Court of the United States for the proper district."

At the time the act of 1875 was passed there was upon the statutes a law which is now Section 640, Revised Statutes 1878, which provided that any corporation organized under the laws of the United States might remove any suit against it by filing an affidavit that its defense to the action arose under the Constitution or laws of the United States. While these two laws were in force it was decided that a railway corporation organized under a law of the United States, could remove suits against it from a State Court to a Federal Court.

The law of 1888 is entirely different from that of 1875. The law of 1888, instead of saying that "*either party*" might remove the suit, changed the wording so as to read, "*The defendant or defendants.*"

This took away the right of any one but the *defendant or defendants* to remove the suit. Section 6 of the law of 1888 also repealed Section 640 Revised Statutes of 1878, thus taking away the right of a Federal corporation to remove a suit by showing that its defense arose under the Constitution or laws of the United States.

Section 2, of the law of 1888, among other things provides, that when a receiver shall be in charge of property by virtue of any suit pending in a Federal Court, that such "*receiver shall operate such property* according to the requirements of the valid laws of the State in which such property shall be situated, etc."

Section 3 of the law of 1888 provides that a receiver appointed by a Federal Court in charge of property may be sued "*in respect of any act or transaction of his in carrying on the business connected with such property*, without the previous leave of the Court in which such receiver or manager was appointed."

It will thus be seen that it was the deliberate intention of Congress to take away largely the power to remove cases from State Courts on the ground that a Federal question was involved. Section 3 permitted Federal receivers to be sued in the State Courts, without leave, when the suit was connected with the operation of the property, because Section 2 had provided that *said receiver should not operate the property under Federal law, but should operate it under the valid laws of the State where such property should be situated.*

It necessarily follows that the property in the hands of the receiver, being operated under State law, any action arising from such operation would arise under State law, and not under Federal law.

Under the law as it is, what Federal question can there be in this case? What is a Federal question? When does a case arise under a law of the United States?

Chief Justice Marshall has said, that a case in law or equity "may truly be said to arise under the Constitution, or a law of the United States whenever its correct decisions depends on the construction of either."

Cohens vs. Virginia, 6 Wheat. 379.

"The suit must be one in which some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution, or a law or treaty of the United States, or sustained by a contrary construction."

Carson vs. Dunham, 121 U. S. 421.

Counsel for plaintiff in error cite the case of *Ames vs. K. P. Ry.*, 111 U. S. 449, as an authority in this case. That was a suit brought, the main purpose of which was to set aside the consolidation of the K. P. Ry. with the Union Pacific. The consolidation was effected under and by *virtue of a law of Congress*, and the result of the suit depended entirely upon the power of Congress to pass the law. It was a case where *one construction of the Constitution would uphold the suit and another would defeat it.* The Court based its decision upon this ground alone, and cite the old case of *Osborn vs. Bank* in support thereof.

The Court said:

"That the validity of the consolidation so far as the State is concerned, rests alone on the authority conferred for that purpose is not denied. If the acts of Congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under the acts of Congress, for, to use the language of the Chief Justice Marshall, an act of Congress 'is the first ingredient in the case, is its origin, is that from which every other part arises.' The right set up by the company and by the directors as well, will be defeated by *one* construction of these acts, and sustained by the *opposite* construction."

Ames vs. K. P. Ry., 111 U. S. 449.

In the case at bar, it would be an impossibility to drag in at any stage in any way a question which would require any sort of a construction of either the Constitution or a law of Congress.

The Pacific removal cases are cited as sustaining the contention of plaintiffs in error in this case. In that case the Court in its opinion, quotes copiously from the case of *Osborn vs. Bank*. There is *one* quotation we desire to call special attention to at this time. It is as follows:

"It is said that a clear distinction exists between the *party* and the *cause*; that the party may originate under a law with which the cause has no connection. * * * This distinction is not denied; and if the act of Congress was a simple act of incorporation and contained nothing more, *it might be entitled to great consideration*. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which the being possesses. Every act of the bank grows out of this law and is tested by it."

115 U. S. 1.

On the theory that the Union Pacific was *operated* under Federal law the Court found that the suit arose under a law of the United States. For special reasons which will hereinafter be stated, we call attention to the fact that the Chief Justice and Justice Miller dissented. In the dissenting opinion of the Chief Justice, we find the following language:

"The acts of incorporation made no provision for the removal to the Courts of the United States of suits begun in a State Court. The act of July 27, 1868, Ch. 255, Sec. 2, 15 Stat. at L. 227, now Sec. 640 of the Revised Statutes, did, however, give authority for that purpose in suits brought against the company in a State Court 'upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States.' If all suits by or against, and all defenses by, a federal corporation

necessarily arise under the laws of the United States 'because the charter of incorporation not only creates it, but gives it every faculty which it possesses,' why require the corporation, when asking for a removal, to cause an oath to be filed with its petition that it has a defense in the suit which arises under the Constitution or laws? If, 'because the power to acquire rights of any description, to sue on those contracts, is given and measured by its charter, and that charter a law of the United States,' every suit by or against, and every defense to such a suit by a federal corporation must arise under the laws of the United States, why require it to set forth in its petition for removal that its defense does arise under such a law? If such a corporation cannot 'have a case which does not arise literally, as well as substantially, under the law,' what is the necessity for saying more than that it is such a corporation?"

If such able judges as the Chief Justice and Mr. Justice Miller would dissent, when Section *640 Revised Statutes were in force*, what would the Court have done in the absence of such section, and what should the Court do now, since Section 640 has been repealed?

The object in passing the law of 1887 and 1888 was to diminish removals, not to increase them. On this subject let us call attention to the case of *Tennessee vs. U. & P. Bank*. In this case the question was, Could the Federal question be raised by answer, or must it appear in the statement of plaintiff's case. In passing upon the question this Court among other things, says:

"The same rule applies more comprehensively to the acts of 1887 and 1888. In Section 1, as thereby amended, the words giving original cognizance to the Circuit Courts of the United States in this class of cases are the same as in the act of 1875 (except that the jurisdictional amount is fixed at $2,000) and it is therefore essential to their jurisdiction that the plaintiff's declaration or bill should show that he asserts a right under the Constitution or laws of the United States. But the corresponding clause in Section 2 allows removals from a State Court to be made only by defendants, and suits 'of which the Circuit Courts are given original jurisdiction by the preceding section,' thus limiting

the jurisdiction of a Circuit Court of the United States on removal by the defendant, under this section, to such suits as might have been brought in that Court by the plaintiff under the first section. The change is, in accordance with the general policy of these acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the Circuit Courts of the United States.

"Congress in making this change, *may well have had in mind the reason* which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defense under the Constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875. 'Looking,' said he, 'to the reason which may have influenced Congress, it may well be supposed that while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the State, and when the act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance. In support of this view, it may be added, he in such case is not without remedy in a Federal Court, for he has pleaded and relied on such defense in the State Court, and that Court has decided against him in regard to it, he can remove the case into this Court by writ of errror, and have the question he has thus raised decided here."

Tennessee vs. Bank, 152 U. S. 462.

Now, if Congress in making the change from *either party* to the *defendant* or *defendants*, and from allowing it to be shown in the *application for removal* to the *plaintiff's statement of his own case*, "May well have had in mind, the reasons which so eminent a judge as Mr. Justice Miller invoked in support of his dissent from the original decision that a defense under the Constitution, laws or treaties of the United States was sufficient to justify a removal by the defendant under the act of 1875, then when Congress repealed Section 640 Revised Statutes of the United States, and provided that receivers could be sued without leave of court, and that property in their hands should be operated under the

law of the States where situated instead of under Federal law, might not Congress well have had in mind the "reasons of so able judges as Chief Justice Waite and Justice Miller invoked in their dissent in the Pacific removal cases, which said reasons are hereinbefore quoted?

The case of *Ry. vs. Cox*, 145 U. S. 593, has been cited as sustaining the cause of plaintiff in error. It will be conceded, that this case comes nearer sustaining the position of counsel for plaintiff in error than any other case cited, and it falls short of the mark. However this may be, in a later case in a more carefully argued opinion by the same judge who wrote the opinion in the Cox case, the doctrine in the former case has been repudiated, and the doctrine laid down flat-footed and emphatic, that the simple fact that one is the receiver of a Federal Court raises no Federal question, and that just such a suit as this one, a suit against the receiver of a railway, for negligence in operating the road *did not arise under any law of the United States.* We refer to the case of *Bausman, Receiver, vs. Dixon*, 173 U. S. 113. This was a case where an effort was being made to take the case from the Supreme Court of a State to this Court upon a writ of error.

If there was no Federal question at all for the Court to pass on, and the Court could not review the case because there was no such question, then how can it be said in the same kind of a case that there is a Federal question for the purpose of removal? We quote from the opinion:

"We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that, because of his appointment as receiver, the judgment against him amounts to a denial of a validity of an authority exercised under the United States, or of a right or immunity specially set up or claimed under a statute of the United States. It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such

was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or so far as appeared in the State Supreme Court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the Circuit Court appointing a receiver did not create a Federal question under Section 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the State Court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.

"We have just held in *Capital National Bank of Lincoln vs. The First National Bank of Cadiz*, 172 U. S. 425, that where the receiver of a National Bank was a party defendant in the State Courts, contested the issues on a general denial, and set up no claim of a right under the Federal statutes, withdrawing the case from the application of general law, this Court had no jurisdiction to revise the judgment of the highest Court of the State resting thereon; and certainly an officer of the Circuit Court stands on no higher ground than an officer of the United States."

Bausman vs. Dixon, 173 U. S. 113.

Pope vs. Ry., 173 U. S. 573.

In the case at bar the decision depended entirely upon general law and the laws of the State of Kansas. The liability to Mrs. Martin depended on the laws of the State of Kansas and upon general law, and not in any way upon the order appointing the receivers.

We therefore conclude that since the law of 1888, cases of this kind cannot be removed to the Federal Court, because in them there is no Federal question.

II.

EVEN IF A FEDERAL QUESTION WAS INVOLVED, IT WAS ABSOLUTELY NECESSARY FOR THE DEFENDANT, THE CHICAGO, ROCK ISLAND AND PACIFC RAILWAY COMPANY, TO JOIN IN THE APPLICATION, TO EFFECT A REMOVAL TO THE FEDERAL COURT.

At the time the receivers filed their petition for removal the other defendant, the Chicago, Rock Island & Pacific Railway Company had already filed its answer and submitted itself to the jurisdiction of the State Court. There being no separable controversy between the plaintiff and the defendant receivers, they could not remove the case without being joined in their petition by the other defendant, the Rock Island. The Rock Island, by answering, lost the right to remove. When the Rock Island lost the right to remove, the right of its co-defendant was gone also.

The Courts are unanimous as to this being the law in all cases where the removal is on the grounds of diverse citizenship. In the case of *Thompson vs. St. P. & K. C. Railway Company, et al.*, in a case on all fours with this case, so far as the nature of the case is concerned, Judge Sanborn uses the following language:

"The first clause of Section 2 of the removal act of 1875, is similar to the second clause of Section 2 of the act of 1887. The only difference between the two clauses is that under the act of 1875 it was provided that *either party* might remove the suit, while under the act of 1887, it is provided that the defendant or defendants, being non-residents of the State, may remove it. It was well settled under this clause of the act of 1875, that a removal could

not be effected unless all the parties on the same side of the controversy united in the petition, and I think there is no doubt that the same must be held to apply to this clause of the act of 1887."

See *Thompson vs. Railway et al.*, 60 Fed. 773 and cases cited.

Guarantee Co. vs. Bank, 28 S. E. 909.

Kane vs. City, 82 Fed. 770.

Ruohs vs. Mtg. Co., 84 Fed. 513.

Deere vs. Ry., 85 Fed. 876.

Carr vs. City, 87 Fed. 1.

It is claimed, however, that because it is claimed that the suit arises under a law of the United States a different rule prevails. It must be conceded that the Circuit judges of the United States are not in harmony on this question. Many of them have held that where a Federal question is involved that one defendant may remove. It seems to us, however, that under the law of 1887 and 1888, those holding that all must join give the best reasons for their opinions.

It was even held that under the law of 1875 that where there is no separable controversy a suit could only be removed on the petition of all the defendants even though the application specifically stated that the cause arose under the Constitution and laws of the United States.

Mayor vs. Steamboat Co., 21 Fed. 593.

In the case just cited Judge Wallace, among other things, said:

"The petition alleges among other things that the controversy arises under the Constitution and laws of the United States. If this is so, the suit can only be removed on the petition of all the defendants, unless there is a separable controversy as between the plaintiff and removing defendant. All the *substantial* parties upon one side of the

controversy must unite in order to remove the suit under the first clause of the second section of the act of March 3, 1875. (*Meyer vs. Construction Co.*, 100 U. S. 437.) Unless all desire and join in the removal it cannot be effected."

In a case before the Texas Civil Court of Appeals against two railroads by the wife for damages for the death of her husband, caused by the joint negligence of the two companies, one of which was a *Federal corporation*, that Court held:

"In an action in a State Court against two railroad companies, one of which is incorporated under the laws of the United States, it is not error to overrule a petition by such *one* only, to remove the cause to the United States Court on the ground that the cause arose under an act of Congress, as *both* should have joined in the petition."

27 S. W. 145.

Dillon's removal of Causes, Fifth Edition, Section 80, reads as follows:

"Where there is no separable controversy as between the plaintiff and removing defendant, but the ground of removal is that the controversy arises under the Constitution and laws of the United States, the suit can only be removed on the petition of all the defendants."

The case of *Shearing vs. Trumbull et al.* was a case identical with the one at bar. The suit was against Trumbull as receiver, and a Colorado corporation, brought by the wife to recover damages for the death of her husband, caused by joint negligence of the defendants, and the receiver sought to remove the case on the ground that the suit arose under a law of the United States. Judge Hallett held that the case could not be removed because the resident defendant could not join in the petition, and in an able and well reasoned opinion, said:

"Trumbull now moves to vacate the order and reinstate the case. He was appointed receiver of the Union Pacific, Denver & Gulf Railway Company in this Court, and if the action had been brought against him alone, there would be no doubt as to his right to remove it. But the suit is against the Denver Consolidated Tramway Company, a Colorado corporation, which has no right of removal, and the question is whether all parties defendant must have such right, in order that it may be maintained by any of them. It is said that the case arises under the Constitution and laws of the United States, but it is not of that character in the sense that there is any federal question to be decided. Whenever a question arises in a case as to the proper construction or effect of the Constitution or some law or treaty of the United States, a Federal Court has jurisdiction of the cause without regard to the citizenship of the parties. (*Water Company vs. Keyes*, 96 U. S. 199.) A suit by or against a federal corporation, or by or against a receiver appointed in a federal court, is not of that class. In such case the suitor has a personal standing in a federal court, in virtue of the authority under which he proceeds. A receiver appointed in a federal court is personally qualified to sue or be sued in such court, because of his appointment. He has the personal standing of a citizen of another State, when the ground of jurisdiction is the diverse citizenship of the parties. In an action of tort against several, all defendants must have the requisite qualifications in order that the suit may be removed to a federal court. (*Pirie vs. Tvedt*, 115 U. S. 41; 5 Sup. Ct. 1034, 1161.) In this instance the defendant Trumbull, as an officer of a federal court, was competent to ask for the removal, but his co-defendant was not in the same situation. As the Tramway Company was not qualified to remove the cause, the defendant Trumbull is under the same disability. In my judgment, *Landers vs. Felton*, 73 Fed. 31, on which the defendant relies, was wrongly decided, and I am not able to follow it."

Shearing vs. Trumbull, 75 Fed. 33.

The case of *Echols vs. Smith*, decided by the Court of Appeals of Kentucky, is another case which meets this question squarely, and holds that such a case is not removable.

42 S. W. 538.

The same doctrine is laid down in Black's Dillon on Removals, Section 77, part of which section reads as follows:

"When there are several defendants in a case, the question arises whether it may be removed to a Federal Court on the petition of one only, or whether all must unite in the application for removal. This must, of course, be determined by the language of the statute. And in the first place, when the ground of removability is that the case involves a Federal question (that is, that it arises under the Constitution or laws of the United States) the act of Congress of 1887 provides for its removal 'by the defendant or defendants therein.' The most plain and obvious construction of this phrase is that where there is but one defendant he may remove the cause in the manner pointed out, but where there are several defendants, the removal may be had on the application of 'the defendants,' that is, all of the defendants. And this interpretation is sanctioned by judicial authority."

Counsel for plaintiff in error place great reliance on the case of *Sonnentheil vs. Brewing Co. et al.*, 172 U. S. 401. This is not applicable to this case at all. It was not a removal case. It did not depend upon the removal statute of 1887, but was a case taken from the Court of Appeals to this Court on a writ of error, and depended upon Section 6 of the act creating the Circuit Court of Appeals, and the question was as to whether the decision of the Court of Appeals was final. The court held it was not final because the jurisdiction did not depend "*entirely* upon the opposition parties being aliens, and citizens of the United States or citizens of different States."

We now come to the case of *Mitchell vs. Smale*, 140 U. S. 406. This case was decided under the removal act of 1875, and not under the act of 1887. In this case the removing defendant set out in his petition that he had a defense under the laws of the United States, and set up the facts showing that his rights depended upon the *construction* to be placed upon a law of the United States, and that upon one construc-

tion of that law *one* decision might be given, and upon another construction an entirely different judgment.

Besides this, in this case the question of joinder of the defendants does not seem to have been considered at all, and was not referred to either by counsel or by the Court.

In conclusion let us call attention to the phraseology of the act of 1887. By this law there are just four kinds or classes of cases which may be removed to the Federal Courts. For the sake of convenience let us number them *one*, *two*, *three* and *four*. Let us set them down in their order:

No. 1. "Any suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought in any State Court, may be removed by the *defendant or defendants* therein, to the Circuit Court of the United States for the proper district."

No. 2. "Any other suit of a civil nature at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought in any State Court, may be removed into the Circuit Court of the United States for the proper district by the *defendant or defendants* therein being non-residents of the State."

No. 3. "When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined between them, *then either one or more of the defendants* actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

No. 4. "Where a suit is pending or may hereafter be brought in any State court, in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, *any defendant* being such citizen of another State may remove such suit into the Circuit Court of the United States for the proper district."

In Numbers *one* and *two*, the language is that "*The defendant or defendants* may remove. In Number three "*either one or more of the defendants* may do so, preceded by the word *then*, which is to say, *in that case* or when the facts are such as just described *either one or more* may remove the case. When the facts are not as described then *one or more cannot* remove. *Expressio unius est exclusio alterius.* It is not even necessary to call to our aid this rule of construction in order to give this statute the meaning contended for, as it is so plain that it construes itself. Number 1 says under circumstances so and so, the *defendant* (if there be but one) or *defendants* (if more than one) may remove; Number 2 says, under circumstances so and so the *defendant* or *defendants* may remove. Then follows Number 3 which refers back to 1 and 2 and says, but if the circumstances be so and so *then* in that case it is different, so much different that *either one or more* of the defendants may remove. In other words it says that if the suit arises under the Constitution or laws of the United States, or if it is a controversy between citizens of different States, the *defendant or defendants* may remove, but in case it is between citizens of different States and there is a *separable controversy* then a different rule prevails, and *either one or more of the defendants* may remove the case.

If Congress meant in Number 1 and 2 that one defendant could remove, why did it say *defendants*, and then in Number 3 change it to *either one or more of the defendants?*

In Number 2, cases of diverse citizenship, the words *defendant or defendants* has universally been held to mean *all* the defendants. If they mean *all* the defendants in *one* case they must mean the same thing in the other.

The attempt to remove this case comes under Number 1 or on the ground that there is a Federal question. The

Rock Island did not join in the petition. It could not join because it had answered. Under such circumstances there could be no removal, and the State court retained jurisdiction, and the judgment of the Supreme Court of Kansas must stand.

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